No. 80-1619

ALEXANDER L. STE...

In the Supreme Court of the United States

OCTOBER TERM, 1980

JACOB E. WHITE, M.D., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

LAWRENCE G. WALLACE
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Apodaca v. *Oregon*, 406 U.S. 404 5

Duren v. *Missouri*, 439 U.S. 357 5

People v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 3

Swain v. *Alabama*, 380 U.S. 202 ..... 3, 4, 5

Taylor v. *Louisiana*, 419 U.S. 522 5

United States v. *Calhoun*, 542 F. 2d 1094, cert. denied, *sub nom. Stephenson* v. *United States*, 429 U.S. 1064 4

United States v. *Corbitt*, 368 F. Supp. 881, aff'd, 497 F. 2d 927, cert. denied *sub nom. Jackson* v. *United States*, 419 U.S. 999 4

United States v. *Durham*, 587 F. 2d 799 4

United States v. *Greene*, 626 F. 2d 75 4

United States v. *Harris*, 368 F. Supp. 697, aff'd, 498 F. 2d 1164, cert. denied *sub nom. Young* v. *United States*, 419 U.S. 1069 4

United States v. *Newman*, 549 F. 2d 240 4

Constitution, statute, and rule:

United States Constitution:

Fifth Amendment 1, 2, 3

Sixth Amendment 1, 2, 3, 5

26 U.S.C. 7201 2

Sup. Ct. R. 23(1)(h) 1

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1619

JACOB E. WHITE, M.D., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his conviction for income tax evasion on the ground that the government's exercise of peremptory challenges against the only three black prospective petit jurors violated his Sixth Amendment right to be tried by an impartial jury and his Fifth Amendment right to due process.[1]

---

[1]In his list of the Questions Presented, petitioner also raises the question "[w]hether [petitioner's] Fifth Amendment rights against self[-]incrimination were violated by the prosecutor's repeated request of [petitioner], during cross-examination and in front of the jury, for production of documents previously ruled by the trial court, out of the jury's presence, not to be accessible by process or search" (Pet. i). Petitioner, however, has not presented any argument in support of his contention that his Fifth Amendment right against self-incrimination was violated but, instead, has merely asserted that (Pet. 19) "[t]he essence of the Second Argument is contained in the question presented." The petition therefore fails to present this question properly, as

On January 24, 1979, petitioner, a black surgeon, was indicted by a grand jury in the Eastern District of Michigan on three counts of income tax evasion for 1972 through 1974, in violation of 26 U.S.C. 7201. Jury selection for petitioner's trial took place on September 14, 1979. On October 2, 1979, after denying petitioner's motion for a mistrial on the basis of challenges to the jury selection, the trial commenced. The evidence, which is undisputed, established that petitioner understated his taxable income by approximately $55,000 in 1972, $33,000 in 1973 and $29,000 in 1974 (VII-Tr. 277; App. 153).[2] After hearing all of the evidence, the jury returned a verdict of guilty on all three counts of the indictment. The district court sentenced petitioner to three years' probation, a fine of $8,000 on each count and eight hours per week of unpaid community service for one year. The court of appeals affirmed (Pet. App. 25-28).

1. The court of appeals correctly held (Pet. App. 27) that petitioner had failed to show the abridgement of any constitutional right by virtue of the jury selection process in this case.

Petitioner contends (Pet. 5-19) that his rights under the Sixth Amendment to be tried by an impartial jury and his rights under the Fifth Amendment to due process were abridged when the prosecutor, by the exercise of his

---

required by Rule 23(1)(h). At all events, the court of appeals found (Pet. App. 28) that when petitioner presented himself as a witness in his own defense, he subjected himself to the range of cross-examination which is permitted of any other witness and his own testimony placed at issue the existence and credibility of the records which did exist.

[2]"Tr." and "App." respectively refer to the trial transcript and the joint appendix in the court below. "Affidavit" refers to an affidavit relating to jury selection filed by the United States Attorney's office in the court of appeals. We are lodging a copy of that affidavit with this Court.

peremptory challenges, excluded all black persons from the jury.[3] He makes no claim that the manner in which juries are selected in the Eastern District of Michigan is racially biased nor does he attempt to show that systematic use of peremptory challenges by government prosecutors has generally excluded blacks from service on juries in that district. Instead, petitioner narrowly argues (Pet. 5-19) that the peremptory challenges removing the only three black jurors in this particular case is sufficient, standing alone, to establish an improper motive by the government to deprive him of his Sixth Amendment right to a jury consisting of a "representative cross-section of the community" and his Fifth Amendment right to due process of law.

But petitioner's claim is neither legally nor factually supported and provides no basis for vacating his conviction. In advancing his argument that peremptory challenges were improperly used by the government, petitioner correctly acknowledges (Pet. 10) that his position is contrary to *Swain* v. *Alabama*, 380 U.S. 202 (1965). There, this Court held that "a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him * * *" (*id.* at 208).[4] In *Swain*, this Court rejected the claim of a black defendant who challenged his conviction on the ground that a state prosecutor had exercised six peremptory challenges to strike six blacks from the jury panel so that the defendant was tried before an

---

[3]One black prospective petit juror was excused by the trial court for cause on the court's own motion (1-Tr. 63-67; App. 10-11, 36-40; Affidavit).

[4]Petitioner's reliance (Pet. 11-15, 19) on *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P.2d 748 (1978), is misplaced. There, the Supreme Court of California clearly pointed out that it was construing a provision of the California Constitution and that it considered *Swain* to be controlling and contrary federal authority (see 22 Cal. 3d at 258, 583 P.2d at 767).

all-white jury (*id.* at 210). The Court ruled that a prosecutor's exercise of peremptory challenges to strike all blacks from the jury panel in a particular case was not a violation of the defendant's right to equal protection and would not, standing alone, constitute grounds for reversal of the conviction. The Court in *Swain*, however, left open the question whether a showing that state prosecutors have systematically employed peremptory challenges over a significant period of time to bar all members of a racial or ethnic group from participating on juries might amount to a constitutional violation (380 U.S. at 222-228).

Unlike petitioner, the defendant in *Swain* attempted to focus the Court's attention on the state's conduct in other cases in order to show a systematic practice of discriminatory use of peremptory challenges (380 U.S. at 222-223). The Court found, however, that it was insufficient merely to point to other cases and show that no blacks had served on juries in other cases without showing that the prosecution had purposefully excluded blacks from the juries over a significant period of time (*id.* at 227-228). Here, on the other hand, petitioner has not even attempted to point to any specific activities of the government in other cases, much less demonstrated repeated purposeful exclusion of blacks from juries as required under *Swain* (*ibid.*).[5]

---

[5]All of the federal courts of appeals that have considered the question have followed *Swain*. See, *e.g.*, *United States* v. *Greene*, 626 F. 2d 75, 76-77 (8th Cir. 1980); *United States* v. *Durham*, 587 F. 2d 799, 801 (5th Cir. 1979); *United States* v. *Calhoun*, 542 F. 2d 1094, 1103 (9th Cir. 1976), cert. denied *sub nom. Stephenson* v. *United States*, 429 U.S. 1064 (1977); *United States* v. *Newman*, 549 F. 2d 240 (2d Cir. 1977) (writ of mandamus issued by the Second Circuit to vacate an order of the district court which had restored to the jury panel at a criminal defendant's trial four black veniremen who had been peremptorily challenged by the government); *United States* v. *Harris*, 368 F. Supp. 697, 705-706 (E.D. Pa., 1973), aff'd, 498 F. 2d 1164 (3d Cir.), cert. denied *sub nom. Young* v. *United States*, 419 U.S. 1069 (1974); *United States* v. *Corbitt*, 368 F. Supp. 881 (E.D. Pa., 1973), aff'd, 497 F. 2d 922 (3d Cir.), cert. denied *sub nom. Jackson* v. *United States*, 419 U.S. 999 (1974).

Although holding that the Sixth Amendment requires that jury lists be chosen from a fair cross-section of the community, this Court has consistently reiterated that (*Taylor* v. *Louisiana*, 419 U.S. 522, 538 (1975)):

> It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition * * *.

See also *Duren* v. *Missouri*, 439 U.S. 357, 364, n.20 (1979); *Apodaca* v. *Oregon*, 406 U.S. 404, 413 (1972) (plurality opinion).

Petitioner's proposal (Pet. 10) that this Court reconsider its decision in *Swain* and adopt a rule which would allow defendants, such as himself, who timely raise the issue of discrimination to obtain a hearing is precisely the argument addressed and rejected in *Swain*. The ruling by this Court in *Swain* that the use of the peremptory challenge will be deemed proper unless a defendant can show that the government has used the challenge systematically to exclude blacks (or any other class of persons) from jury duty over a period of time reflects a proper balance between the rights of defendants and the benefits supporting the use of peremptory challenges. Both the district court and the court of appeals (Pet. App. 26-27) correctly found that the record in this case presented insufficient evidence to support a finding of such systematic exclusion.

To be sure, the district court stated its "belief that the removal was, in fact, racially motivated" (Pet. App. 24) and the court of appeals stated that it was "grave[ly] concern[ed]" with the "appearance of impropriety" (*id.* at 27). Nevertheless, the record supports the court of appeals'

further statement "that there may have been some nondiscriminatory factors in the background of the individual jurors to account for their removal by the government's peremptory challenges" (Pet. App. 27). Thus, one of the black prospective jurors peremptorily challenged by the goverment had recently worked as a receptionist in a doctor's office (I-Tr. 27, 36, 50; App. 27, 31, 34; Affidavit), another had been a hospital employee for 21 years (I-Tr. 30, 40, 72; App. 29, 32, 42; Affidavit), and a third was a licensed practical nurse (I-Tr. 67, 72; App. 40, 42). Since petitioner was a surgeon, the government's peremptory challenges of these potential jurors were independently justified. Moreover, the fourth black prospective juror peremptorily challenged by the government had "reluctantly" paid the Internal Revenue Service $2,000 following an audit (I-Tr. 29, 33, 43, 58; App. 28, 30, 33, 35).[6] It was likewise reasonable for the prosecutor to seek to exclude such a person from the jury.

---

[6]As for the government's two other peremptory challenges, one was used to excuse a white person (I-Tr. 30, 58; App. 29, 35; Affidavit) and one was waived (I-Tr. 68; App. 41). Although two jurors with medical-related work experience were ultimately empanelled, this occurred after the government had exercised all of its peremptory challenges (I-Tr. 75-80; App. 43-46; Affidavit). Moreover, while other jurors admitted to having been audited by the Internal Revenue Service, the experience of the prospective juror excused seemed to have been the most negative.

The court of appeals also expressed concern over the fact that although petitioner "was a resident of Detroit, not one juror from that city was permitted to remain on the jury" (Pet. App. 27). We note, however, that at least one prospective trial juror who was a resident of Detroit was removed by petitioner's peremptory challenge (I-Tr. 50, 63).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

LAWRENCE G. WALLACE
*Acting Solicitor General**

MAY 1981

---

*The Solicitor General is disqualified in this case.

DOJ-1981-05